

01434

Proc Law II Mr. [unclear]



DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20540**

FILE: B-186198

DATE: January 7, 1977

MATTER OF: Abbott Power Corporation

DIGEST:

1. Bid which does not take exception to solicitation provisions and is responsive on its face may not be determined to be nonresponsive on the basis of information obtained from bidder after bid opening.
2. Specification provision which is similar to one previously conceded by agency to be unduly restrictive and which agency admits is "unrealistic requirement" which will not be used in future also appears to be unduly restrictive.
3. Bid which takes "exceptions to the specifications" and which is based on bidder's own standard conditions of sale which are not included with bid, is at best ambiguous and must be rejected as nonresponsive.
4. Where contract is improperly awarded, GAO will normally recommend termination of contract. However, where performance is nearly complete and delay in delivery would have serious adverse effect on Government, it would not be in best interest of Government to disturb contract.

Abbott Power Corporation (Abbott) has protested the rejection by the Veterans Administration (VA) of its bid submitted in response to invitation for bids (IFB) No. 76-29. Abbott contends that its bid was found to be nonresponsive under an overly restrictive provision of the specifications which VA had previously advised Abbott would not be construed to prohibit Abbott from competing for the award. Abbott also contends that the VA improperly based its determination that Abbott was nonresponsive on information obtained after bid opening.

The specification provision in question for this purchase of primary switchgear for the VA Hospital in Minneapolis, Minnesota stated:

"Unless specifically noted otherwise on the drawings or in the specifications all major components of a unit shall be manufactured by the manufacturer of the unit."

B-186198

Abbott states that, prior to submitting its bid its sales manager contacted the contracting officer who admitted that the solicitation was restrictive but that " * * * he either would not or could not * * *" amend the clause to which Abbott objected. Instead, states Abbott, the contracting officer referred Abbott's sales manager to a VA engineer in Washington, D.C. According to Abbott, the engineer indicated that the clause was " * * * not intended to prohibit Abbott Power Company from bidding * * * /and/ * * * asked that Abbott Power Corp. submit a quotation." Abbott then submitted a bid.

After bid opening the VA requested additional information from the bidders concerning the specification provision quoted above. In response, Abbott and other bidders indicated that they did not intend to supply equipment in which all major components of a unit would be manufactured by the manufacturer of the unit. As a result, VA determined that their bids were nonresponsive. VA also rejected the low bid because it did not offer a firm fixed price. The contract was awarded on March 26, 1976, to the General Electric Supply Company (GE), the sixth low bidder.

It is clear from this record that the protest has merit. First of all, Abbott's bid as submitted did not take exception to any specification requirement, and it is a firmly established principle of formal advertising that the responsiveness of a bid is determined on the basis of the bid as submitted and not on the basis of information submitted by a bidder after bid opening. See, e.g., Abbott Laboratories, B-183799, September 23, 1975, 75-2 CPD 171; Veterans Administration re Welch Construction, Inc., B-183173, March 11, 1975, 75-1 CPD 146; 38 Comp. Gen. 532 (1959). Although the information sought by VA could have been considered in connection with determining the responsibility of a bidder, see B-168610, April 7, 1970; B-172985, September 14, 1971, it was improper for VA to use that information as a basis for rejecting a bid as nonresponsive.

Secondly, the specification provision itself appears to be unduly restrictive since (1) the provision is similar to one used by the VA in other procurements and which VA has acknowledged to be unduly restrictive of competition, see Abbott Power Corporation, B-186368, December 21, 1976, 76-2 CPD _____, and (2) in this case, the VA, although not expressly conceding the restrictiveness of the protested provision, has not defended its use and has instead stated that the provision "is, perhaps, an unrealistic requirement * * * and * * * will be eliminated from future specifications."

B-166198

The record also suggests that the award to GE was improper because the bid submitted by that firm took "exceptions to the specifications" and stated that "Standard Conditions of sale apply as noted in handbook 6601, pages 1 & 2." The handbook referred to was a GE handbook which was neither submitted with the bid nor in the possession of the contracting officer. Although the contracting officer states his belief that GE's standard conditions of sale were not intended to be part of the bid, we think a fair reading of the GE bid is that it was predicated on that firm's own conditions of sale and that at best it must be regarded as ambiguous. Bids containing an ambiguity which could affect a material solicitation requirement, which is clearly the case here since the contracting officer did not know precisely what GE's conditions of sale were, must be rejected as nonresponsive. See, e.g., D. Moody & Company Inc. et al., 55 Comp. Gen. 1, 27 (1975), 75-2 CPD 1.

For the foregoing reasons, the protest is sustained. Ordinarily, under these circumstances we would recommend termination of the awarded contract and a resolicitation on the basis of properly drafted specifications. However, it appears that such action is neither feasible nor in the best interest of the Government at this point. In this regard, VA points out that the delivery date for the switchgear is January 28, 1977, and that timely delivery is critical. VA further states that:

"The updating of our Electrical Distribution System is most critical to the continued operation of this Veterans Administration Hospital. * * *.

* * * * *

"Any delay in this delivery will have the following impact: It will delay the balance of Project #618-054 and will not have services available for Nuclear Medicine/Cardiology building planned for completion in June; the critical completion and placing into operation of the new Ambulatory Care Clinic; the proposed expansion of Diagnostic Radiology; the proposed Nursing Home addition to this hospital; and the installation of a new Boiler Plant. The power requirements for critical patient buildings is increasing

B-186198

At an ever faster pace and expansion of the system is directly dependent upon the delivery and installation of the switchgear. The project for expansion of the Secondary Electrical Distribution would have to be delayed which will directly affect the treatment of patients on the various wards. For example, all air conditioning has been postponed until completion of the project. Areas such as the new Clin Lab were installed and power utilized serving Building 1 which would have had to be saved for direct patient care if the Distribution Project would not be in effect.

"In summary, the continued expansion for proper modern treatment at this veterans installation is directly dependent on the prompt delivery of this switchgear. The production of the switchgear by General Electric is proceeding at a rate that would allow them to fulfill their contract commitment."

In these circumstances, we do not believe we would be warranted in disturbing the contract.

We note that Abbott suggests that it can meet VA's delivery requirements if an order is placed with it promptly and that contract termination therefore is feasible. However, there is no basis for an award to Abbott if the GE contract were to be terminated, since two other firms rejected for the same reason as Abbott submitted bids that were lower than Abbott's bid. Moreover, award under the IFB used by VA would not be appropriate in view of the restrictive specification provision.

Although we are unable to recommend contract termination in this case, we are deeply concerned over the procurement deficiencies noted and by separate letter are bringing this matter to the attention of the Administrator of Veterans Affairs.

Deputy


Comptroller General
of the United States